In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 900

HIGHWAY EXPRESS LINES, INC., ET AL., APPELLANTS

v.

JONES MOTOR CO., INC.

No. 977

PENNSYLVANIA PUBLIC UTILITY COMMISSION, APPELLANT

v.

JONES MOTOR CO., INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The United States and the Interstate Commerce Commission did not appeal from the decision below because, in their view, the issues were not sufficiently important to warrant seeking review in this Court.[1] We believe that the governing principles in this type

[1] While the Interstate Commerce Commission did file a notice of appeal, it dismissed its appeal from the decision below after this Court's affirmance in *Arrow Carrier Corp.*

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of case have recently been established by *Arrow Carrier Corp.* v. *United States and Interstate Commerce Commission*, 375 U.S. 452. In *Arrow*, this Court affirmed, *per curiam*, the decision of the district court, 219 F. Supp. 43 (D. N.J.), holding that the Commission is empowered to issue cease and desist orders prohibiting motor carriers possessing interstate certificates of public convenience and necessity from conducting their operations under these certificates as a subterfuge to avoid State regulation of *intrastate* commerce. *Arrow* also held that abuse of the *interstate* certificates was shown by the circuity of the carrier's routes (connecting Pennsylvania points through New Jersey), which were not "logical and normal" operations but apparently employed to avoid State regulation.

As we pointed out in our motion to affirm filed in *Arrow*, it seems clear that there is no conflict between that case and the instant one as to the extent of the Commission's power. The only issue here is the application of the proper standards to the particular evidence of the case.

Jones Motor Co., Inc. ("Jones") is primarily an interstate carrier and does not possess any authority from the Pennsylvania Public Utility Commission to operate between the Philadelphia and Allentown, Pa. areas. Jones has two interstate certificates issued by the Interstate Commerce Commission, which authorize it to operate between Philadelphia, Pa. and New York, N.Y., and between Elizabeth, N.J. and Allentown, Pa. By tacking these operations at Clinton,

N.J., a service point common to both certificates, Jones is able to provide service between Philadelphia and Allentown where it maintains terminals (J.S. PUC 48–49).[2]

The district court and the Commission found that Jones used these interstate certificates as the basis for soliciting traffic which had its origin and destination in Pennsylvania (J.S. PUC 49). During May and June of 1957, Jones carried 22 Pennsylvania shipments, together with 108 shipments "admittedly interstate in character," between Philadelphia and Allentown, Pa. over routes passing through the State of New Jersey. The district court found that the "shipments involved moved over these routes at night and there were no pickups, changing of freight from one vehicle to another, or any business or terminal stops in New Jersey. This was a terminal to terminal operation by Jones" between points in Pennsylvania (J.S. PUC 48, 49). Jones does not maintain any terminals in New Jersey.

The Commission, on the complaint of the Pennsylvania Public Utility Commission, had issued an order to Jones to cease and desist from using its federal interstate certificates to transport goods between Philadel-

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[2] "J.S. PUC" refers to the jurisdictional statement filed by the Pennsylvania Public Utility Commission, No. 977, this Term.

Significantly the route used by Jones, *i.e.* between Philadelphia and Allentown, Pa. via Clinton, N.J., is almost identical to the route used by Arrow Carrier Corporation. The route between Philadelphia and Allentown, Pa. via New Jersey is substantially longer and consumes materially more driving time than the direct routes lying wholly within Pennsylvania (J.S. PUC 51).

phia and Allentown, Pennsylvania through Clinton, New Jersey (J.S. PUC 87). The district court reversed this order because it ruled that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones. The court found that it was logical and normal for Jones to carry shipments from Philadelphia and Allentown by way of Clinton, New Jersey. This conclusion was based upon the court's finding that Jones carried little traffic between these points and that economically it made more sense for it to commingle these intrastate shipments with interstate shipments than to ship them separately on a wholly intrastate route (J.S. PUC 62–63).[3]

The district court's rationale is that federal interstate certificates may be used to carry limited amounts of intrastate traffic on a circuitous interstate route, if these shipments are commingled with interstate shipments because they are too few to support an independent intrastate service. This would lead to the anomalous result of permitting a carrier to transport small amounts of intrastate shipments but prohibiting it from carrying such shipments if his business improves to the point where he would have enough to carry full intrastate truckloads. Apart from diffi-

[3] However, the majority opinion below overlooks the fact that the 22 shipments were merely representative of the type of operations conducted by Jones. These were not to be considered as the total number of Pennsylvania shipments by Jones, nor could these 22 shipments be used to establish any valid percentage relationship of the total number of shipments transported by Jones. (J.S. PUC 77–78, 80–81.)

culties of administration inherent in this approach, we suggest that a determination whether a carrier is using his federal certificate to avoid State regulation should not be dependent on the volume of intrastate shipments it is successful in attracting. On the contrary, we believe that the Commission was warranted in concluding that the operations of Jones were a subterfuge since it found (a) that there had been circuitous routing and (b) that there was no showing by Jones that it performed any necessary service or operation on these shipments when they were transported through New Jersey. See *Service Transfer Co.* v. *Virginia*, 359 U.S. 171. However, as indicated above, the reasons for plenary consideration do not appear compelling in the light of this Court's disposition of the *Arrow* litigation.

Respectfully submitted.

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